Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

NORTH TEXAS STEEL COMPANY, INC.,

Petitioner,

vs.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution permits an Indiana court to exercise personal jurisdiction over a Texas corporation which had no direct contacts with the State of Indiana other than the knowledge that a product, on which it performed fabrication services, was to be sold by a third party for use in the State of Indiana.

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UNITED STATES CONSTITUTION

U.S. CONST. amend. XIV, § 1 2

OPINIONS AND ORDERS BELOW

The decision by the Court of Appeals of Indiana that gives rise to this Petition is published as *North Texas Steel Company, Inc. v. R.R. Donnelley & Sons Company*, 679 N.E.2d 513 (Ind. App. 1997), and is reprinted in the Appendix hereto at p. A-1. By Order dated December 3, 1997, the Supreme Court of Indiana denied Appellant's Petition for Transfer to that Court. This Order is reprinted in the Appendix hereto at p. A-17. The decision of the Court of Appeals of Indiana affirmed an Order of the Kosciusko Circuit Court, Cause No. 43C01-9512-CP-999, denying Petitioner's Motion to Dismiss for lack of personal jurisdiction. That Order is reprinted in the Appendix hereto at p. A-19.

JURISDICTIONAL STATEMENT

On May 10, 1996, the Kosciusko Circuit Court, Kosciusko County, Indiana, entered an Order denying Petitioner, North Texas Steel Company, Inc.'s (hereinafter "North Texas Steel") Motion to Dismiss for lack of personal jurisdiction. On August 2, 1996, the Kosciusko Circuit Court entered its Order certifying that Order for interlocutory appeal pursuant to Appellate Rule 4(B)(6) of the Indiana Rules of Appellate Procedure. On August 30, 1997, the Court of Appeals for Indiana granted North Texas Steel's Petition to Accept Jurisdiction of Interlocutory Appeal pursuant to Appellate Rule 4(B)(6) of the Indiana Rules of Appellate Procedure. On April 29, 1997, the Court of Appeals of Indiana entered its Opinion affirming the judgment of the Kosciusko Circuit Court.

North Texas Steel timely filed its Petition for Transfer to the Indiana Supreme Court pursuant to Rule 11 of the Indiana Rules of Appellate Procedure. On December 3, 1997, the Indiana Supreme Court denied North Texas Steel's Petition for Transfer pursuant to Appellate Rule 11(B) of the Indiana Rules of Appellate Procedure.

This Petition for Writ of Certiorari is being timely filed in accordance with Rule 13.1 of the Rules of the Supreme Court of the United States. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The constitutional provision at issue in this case is U.S. CONST. amend. XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This appeal arises from a property damage action filed by the respondent, R.R. Donnelley & Sons Company (hereinafter "R.R. Donnelley"), as a result of the collapse

of a storage rack system on which the petitioner, North Texas Steel, performed certain fabrication services. On December 18, 1995, R.R. Donnelley filed its Complaint and Demand for Jury Trial, asserting causes of action against North Texas Steel for negligence and breach of contract. Subsequently, R.R. Donnelley filed an Amended Complaint adding a claim for strict liability against North Texas Steel.

On January 26, 1996, North Texas Steel filed its Motion to Dismiss on the grounds of lack of personal jurisdiction. Specifically, North Texas Steel contended that it did not have sufficient minimum contacts to permit the exercise of personal jurisdiction by a court of the State of Indiana as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Defendant North Texas Steel Company, Inc.'s Motion to Dismiss, p. 1, Record, p. 48; Memorandum of Law in Support of Defendant, North Texas Steel's Motion to Dismiss, pp. 6-22; Record, pp. 56-72).

> "It is axiomatic that an Indiana Court must have personal jurisdiction over a defendant in order to render a valid personal judgment against that defendant. *Freemond v. Somma*, (Ind. App. 1993), 611 N.E.2d 684, 687. Sufficient 'minimal contacts' must exist between the forum state and the non-resident defendant 'to make it reasonable and just, according to our traditional conception of fair play and substantial justice' to permit a forum state to exercise personal jurisdiction over the non-residential defendant. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95, (1945). In the present case, it is clear that North Texas Steel has no contacts with the State of Indiana, much

> less the minimum contacts required by the Fourteenth Amendment." (Record, pp. 56-57).

On May 10, 1996, the Kosciusko Circuit Court denied North Texas Steel's Motion to Dismiss. (May 10, 1996 Order of the Court re: Motion to Dismiss, Record, pp. 468-469; A-19-A-20). In denying the Motion to Dismiss, the Kosciusko Circuit Court specifically found that North Texas Steel had sufficient contacts with the State of Indiana to justify the imposition of personal jurisdiction.

> "The Court believes that, in weighing the contacts of North Texas Steel with the State of Indiana, its business practice has fairly submitted it to the jurisdiction of the Courts of Indiana. All of the evidence indicates that North Texas Steel performed all of its services within the State of Texas but that in so doing, it was specifically preparing an item which it knew to be solely for shipment to R.R. Donnelley at Warsaw, IN. Because the item was prepared with knowledge of its specific purpose for shipment to and usage within the State of Indiana, the Court believes that it is proper to consider the issues of the product's alleged failure in Indiana Courts." (Order, p. 1; Record, p. 468, A-19-A-20).

In its appeal to the Indiana Court of Appeals from the denial of its Motion to Dismiss for lack of personal jurisdiction, North Texas Steel once again raised the issue of whether North Texas Steel had sufficient minimum contacts with the State of Indiana to permit the Courts of the State of Indiana to exercise personal jurisdiction over North Texas Steel in a manner consistent with the Due Process Clause of the Fourteenth Amendment to the

United States Constitution. (Brief of Appellant, pp. 18-30).

> "In this case, when focusing on North Texas Steel's activities in the State of Indiana, it is clear that North Texas Steel did not perform any act by which it purposely availed itself of the privilege of conducting activities within the State of Indiana. North Texas Steel does not do business in Indiana. It has no office, agents, employees, or property in Indiana. It does not advertise or otherwise solicit business in Indiana. It did not create, control, or employ the distribution system that brought the storage racks on which it performed fabrication services to the State of Indiana. North Texas Steel did not design the storage rack system in anticipation of sales in Indiana. In fact, North Texas Steel did not design the storage rack system at all. Instead, the only contact with the State of Indiana is that North Texas Steel was aware that the storage rack system on which it was performing fabrication services for Frazier was to be ultimately delivered to the State of Indiana. On the basis of these facts, the exercise of personal jurisdiction by the Kosciusko Circuit Court over North Texas Steel exceeds the limits of due process." (Brief of Appellant, p. 20).

In affirming the judgment of the trial court denying North Texas Steel's Motion to Dismiss, the Court of Appeals of Indiana, like the trial court, based its determination solely on its finding that the exercise of personal jurisdiction over North Texas Steel was consistent with the requirements of the Due Process Clause of the Fourteenth Amendment.

> "We do find, however, that the trial court was correct in determining that it had specific personal jurisdiction over NTS as RRD's claims arise from or relate to NTS's contact with Indiana. . . . We also find that the exercise of personal jurisdiction over NTS comports with the due process concepts of fair play and substantial justice." *North Texas Steel Company, Inc. v. R.R. Donnelley & Sons Company*, 679 N.E.2d 513, 519 (Ind. App. 1997), A-10-A-11.

North Texas Steel timely filed its Petition for Transfer with the Indiana Supreme Court. In that Petition, North Texas Steel once again specifically raised the issue of whether the exercise of personal jurisdiction over North Texas Steel complied with the Due Process Clause of the Fourteenth Amendment.

> "The opinion contravenes ruling precedent of the United States Supreme Court in *Asahi Metal Industry Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed. 92 (1987); and *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), in that it holds that Indiana courts may exercise personal jurisdiction over the appellant as a result of the fabrication work it performed on a good which was to be sold by a third party to an Indiana corporation, where that fabrication work was simply an isolated occurrence and did not arise from the efforts of the appellant to serve, directly or indirectly, the market for its products in other states." (Petition for Transfer, p. 2).

On December 3, 1997, the Indiana Supreme Court denied transfer. (See, A-17-A-18). North Texas Steel now

petitions for a Writ of Certiorari pursuant to 28 U.S.C. §1257(a).

R.R. Donnelley is a corporation organized under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. (Record, p. 116). R.R. Donnelley's primary business is printing and assembling catalogs for retailers such as J.C. Penney, Lands End, Eddie Bauer, and Speigel. (Record, p. 117). R.R. Donnelley operates a printing and binding facility in Warsaw, Indiana. (Record, p. 117).

On or about June 28, 1993, R.R. Donnelley contracted with Associated Material Handling Industries, Inc. (hereinafter "Associated"), to provide a material handling system, including storage racks, sophisticated forklifts, conveyors, and other related equipment for its Warsaw facility. (Record, p. 117). The purchase price for that material handling system was $1,180,000.00. (Record, p. 30). Subsequently, Associated subcontracted the storage rack design and manufacture work to Frazier. (Record, p. 118). Frazier designed the storage racks to be used at the R.R. Donnelley Warsaw facility. (Record, p. 118).

Frazier hired North Texas Steel as a subcontractor for the Donnelley job to perform fabrication services on raw steel supplied by Frazier, using a welding machine supplied by Frazier. (Record, p. 79). Pursuant to its contract with Frazier, North Texas Steel provided fabrication services for certain, but not all, component parts of the storage racks ultimately purchased by R.R. Donnelley. (Record, pp. 313-314). North Texas Steel was not involved in the design of the storage racks purchased by R.R. Donnelley, or any component thereof. (Record, p. 314).

Frazier provided to North Texas Steel all specifications, drawings and welding requirements for the component parts fabricated by North Texas Steel that eventually became part of the storage rack purchased by R.R. Donnelley. (Record, p. 314). In fact, Frazier had a full-time inspector at North Texas Steel's Fort Worth plant where all the fabrication services were performed. (Record, p. 79). Frazier's inspector had the opportunity to inspect and approve North Texas Steel's work prior to shipping. (Record, p. 79).

Frazier supplied the steel on which North Texas Steel performed its fabrication services. (Record, p. 314). Frazier ordered the steel and specified the size, weight, type, grade and amount of steel. (Record, p. 314). Frazier caused the steel to be shipped to North Texas Steel. (Record, p. 314). North Texas Steel was only one of at least two firms which performed fabrication services upon the component parts of the storage rack ultimately purchased by R.R. Donnelley. (Record, p. 314).

Frazier provides instructions to North Texas Steel regarding the shipping of component parts of the storage racks upon which North Texas Steel performs fabrication services for Frazier, including the component parts which ultimately became a part of the R.R. Donnelley storage rack. (Record, pp. 314-315). Frazier directs North Texas Steel when to ship the component parts of the rack and to whom. (Record, p. 315). At Frazier's directions, North Texas Steel delivered the component parts which ultimately became part of the R.R. Donnelley storage rack to a Frazier-approved carrier with shipping terms "f.o.b. Fort Worth". (Record, p. 315). Frazier paid the shipping

costs to have the component parts shipped from Fort Worth, Texas to Indiana. (Record, p. 315).

Prior to its work on the storage rack at issue in this case, North Texas Steel provided fabrication services on numerous occasions for Frazier. (Record, p. 313). North Texas Steel conducts two basic types of fabrication work, structural and rack. (Record, p. 78). Structural work consists of fabrication for large projects such as highways, bridges and steel building construction. (Record, p. 78). At least 90 percent of North Texas Steel's structural work is performed for projects in the State of Texas. (Record, p. 78). Rack work entails fabrication work only. Fabrication consists of the cutting, punching, welding and painting of steel members. (Record, p. 78). All of North Texas Steel's fabrication work is performed solely in its plants in Fort Worth, Texas. (Record, p. 79). North Texas Steel obtains all of its rack work solely through contracts with Frazier. (Record, p. 79).

At the time that North Texas Steel, pursuant to Frazier's design specifications, was performing the fabrication services upon component parts that eventually became part of the R.R. Donnelley storage rack, North Texas Steel was also performing the same type of fabrication services for Frazier on component parts for storage racks Frazier provided for other of its customers. (Record, p. 314). The fabrication services performed by North Texas Steel and the component parts which were eventually incorporated into R.R. Donnelley storage racks were substantially identical to the fabrication services performed by North Texas Steel for Frazier upon component parts of other storage racks which Frazier sells to other Frazier customers. (Record, p. 315).

North Texas Steel did not know the intended use for the storage racks at the time of contracting or completion of its work on the R.R. Donnelley storage rack. (Record, p. 80). North Texas Steel only knew that the racks on which it was performing fabrication services were ultimately going to a distribution center for R.R. Donnelley located in the State of Indiana. (Record, p. 80). The fabrication services performed by North Texas Steel on the component parts which were eventually incorporated into R.R. Donnelley storage racks were substantially identical to the fabrication services performed by North Texas Steel for Frazier upon component parts of other storage racks which Frazier sells to other of its customers. (Record, p. 315). North Texas Steel billed Frazier $56,195.00 for the fabrication services performed upon the steel Frazier caused to be delivered to North Texas Steel that eventually became part of the storage rack purchased by R.R. Donnelley. (Record, p. 314).

North Texas Steel has never negotiated, contracted or done business with R.R. Donnelley. (Record, p. 80). Prior to the assertion of the claim forming the subject in this proceeding, North Texas Steel had never even communicated with R.R. Donnelley, and no agent or employee of North Texas Steel had ever entered Indiana in connection with the storage rack at issue. (Record, p. 80). Negotiations between Frazier and North Texas Steel were minimal. (Record, p. 80). Frazier sent drawings from Long Valley, New Jersey to North Texas Steel in Fort Worth. (Record, p. 80). Frazier knew in advance North Texas Steel's general price structure and that North Texas Steel had the capacity at the time to complete the R.R. Donnelley job. (Record, p. 80). North Texas Steel accepted

Frazier's offer through commencing performance of the contract at its Fort Worth plants. (Record, p. 80). Frazier thereafter sent to North Texas Steel a signed purchase order for the fabricated steel members. (Record, p. 80).

North Texas Steel neither presently maintains, nor has it ever maintained, any offices or facilities in the State of Indiana. North Texas Steel does not have a certificate or license to do business in the State of Indiana and never has. (Record, p. 77). North Texas Steel neither presently, nor has it ever had, any employees or agents in the State of Indiana. (Record, p. 77). North Texas Steel does not presently own, nor has it ever owned, real or personal property in the State of Indiana. (Record, p. 78).

North Texas Steel does not solicit business in the State of Indiana. (Record, p. 78). North Texas Steel does not advertise in any trade journals, magazines, or other publications targeting the State of Indiana, nor does North Texas Steel advertise in any nationally distributed publications. (Record, p. 78). North Texas Steel has never contracted with an Indiana corporation, business or individual to provide a product or perform services in the State of Indiana. (Record, p. 78). Prior to its work on the storage rack at issue, North Texas Steel has provided fabrication services on only three racks which were ultimately shipped by Frazier to the State of Indiana, the most recent of which was in 1987. (Record, p. 78). Other than the storage rack shipped by Frazier to R.R. Donnelley, since 1987 North Texas Steel has not performed fabrication or any other type of work on any product ultimately located in the State of Indiana. (Record, p. 78).

On June 14, 1994, a majority of the storage racks at R.R. Donnelley's Warsaw facility collapsed. (Record, p. 119).

REASONS FOR GRANTING THE PETITION

This appeal once again raises the issue of the applicable limits of the stream of commerce theory of personal jurisdiction, first set forth by this Court in *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 490 (1980), and addressed once again in *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). In *World-Wide Volkswagon*, this Court rejected the argument that jurisdiction is appropriate in any forum where a product which is sold by a defendant may foreseeably cause injury. This Court noted that foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. *Id.*, 444 U.S. at 295, 100 S.Ct. at 566, 62 L.Ed.2d at 500. However, this Court went on to state that foreseeability was not wholly irrelevant to the issue of personal jurisdiction.

> "But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct in connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.*, 444 U.S. at 297, 100 S.Ct. at 567, 62 L.Ed.2d at 501.

This Court further noted that when a corporation purposely avails itself of the privilege of conducting

activities within the forum state, it has clear notice that it is subject to jurisdiction in that state. *Id.*

> "Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagon is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to the suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or others. The forum State does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.*

This Court once again addressed the "stream of commerce" theory of personal jurisdiction in *Asahi Metal Industry*. While this Court in *Asahi* was unanimous in holding that the exercise of personal jurisdiction over the Japanese third-party defendant under the circumstances of that case would offend "traditional notions of fair play and substantial justice" and thus be in contravention of the Due Process Clause, 480 U.S. at 113, 107 S.Ct. at 1033, the Court was evenly divided as to the requirements for the application of the stream of commerce theory of personal jurisdiction.

The plurality opinion authored by Justice O'Connor noted the divergence of authority arising out of the stream of commerce language set forth in *World-Wide Volkswagon*. Justice O'Connor noted that some courts, like the Supreme Court of California in *Asahi*, held that the

fact that the stream of commerce eventually brought some products into the forum state and the defendant was aware that its products would be sold in the forum state, was sufficient to permit the forum state to exercise jurisdiction over the defendant manufacturer consistent with the requirements of due process. *Id.*, 480 U.S. at 110, 111, 107 S.Ct. at 1031.

By contrast, Justice O'Connor noted, other courts understood the Due Process Clause to require something more than that the defendant was aware of its products entry into the forum state through the stream of commerce in order for the state to exert personal jurisdiction over the defendant. The plurality opinion by Justice O'Connor, joined by three other Justices, found that the latter position to be "consonant with the requirements of due process." *Id.*, 480 U.S. at 112, 107 S.Ct. at 1032.

> "The 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. . . . The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State. But a

> defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed towards the forum state." *Id.* (emphasis original).

By contrast, the opinion of Justice Brennan, also writing on behalf of three other Justices, disagreed with the plurality opinion of Justice O'Connor as to the requirements for personal jurisdiction under the stream of commerce theory. Specifically, the opinion of Justice Brennan rejected the need for showing additional conduct directed toward the forum state before a finding of personal jurisdiction over the defendant to be consistent with due process.

> "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State." *Id.*, 480 U.S. at 117, 107 S.Ct. at 1034-1035

The decision of this Court in *Asahi* did nothing to rectify the divergence of authority which was noted by Justice O'Connor in the plurality opinion. Subsequent to this Court's decision in *Asahi*, both federal and state courts have continued to differ as to the requirements for the applicability of the stream of commerce theory of personal jurisdiction.

Both the First Circuit and Fourth Circuit have adopted the position taken by Justice O'Connor in the plurality opinion in *Asahi*. *In re Celotex Corp.*, 124 F.3d 619, 629 (4th Cir. 1997); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946 (4th Cir. 1994); *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997); *Sawtelle v. Farrell*, 70 F.3d 1381, 1393 (1st Cir. 1995). By contrast, the Fifth Circuit, Seventh Circuit and Eighth Circuit have adopted the position taken by the opinion of Justice Brennan in *Asahi*. *Ruston Gas Turbines, Inc. v. Donaldson Company, Inc.*, 9 F.3d 415, 420 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614 (8th Cir. 1994).

> "Because the Supreme Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue, we continue to gauge the non-resident defendant's contacts with Texas by the stream of commerce standard as described in *World-Wide Volkswagon* and embraced in this circuit." *Ruston, supra, quoting, Irving v. Owens Corning Fiberglass Corp.*, 864 F.3d 383, 386 (5th Cir. 1989).

While these circuits have taken sides in the stream of commerce debate, other circuits have simply taken the

position that, due to the unsettled nature of this Court's rulings with regard to the stream of commerce theory, they should avoid taking a position and attempt to decide each case on the facts and on the basis of prior personal jurisdiction case law. *Omeluk v. Langsten Slip and Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995); *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3rd Cir. 1994); *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 427-428 (Fed. Cir. 1996); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993).

> "This court has not revisited the 'stream of commerce' theory since the Supreme Court's opinion in *Asahi*. Although the 4-4-1 vote of the Supreme Court makes it difficult to even attempt to promulgate the last word on the 'stream of commerce' theory, certain guidelines have emerged. It is clear, for example, from *Asahi* and its precursors that there must have been some 'purposeful availment' by the defendant of the forum state. . . . Because the distinction between Justice O'Connor's view and Justice Stevens may be a subtle one, requiring another Supreme Court decision to flesh out the lines between them, most of the circuits to have addressed the 'stream of commerce' theory since *Asahi* have chosen to avoid taking a position on the current status, attempting when possible to decide the case on the basis of the facts on record." *Renner*, at 282.

The decisions of state courts concerning the stream of commerce theory have been just as disparate. Several state courts have adopted the opinion of Justice O'Connor in *Asahi*, holding that the mere placement of a product in the stream of commerce with knowledge that the

product may or will enter the forum state is not sufficient to impose personal jurisdiction consistent with the due process clause. *Sorrells v. R&R Custom Coach Works, Inc.*, 636 So.2d 668, 674 (Miss. 1994); *Halderman v. Sanderson Forklifts Company, Ltd.*, 818 S.W.2d 270, 274 (Ken. App. 1991); *Johnson v. Peacock Lumber Company, Inc.*, 770 P.2d 690, 714 (Ore. App. 1989). Conversely, other state courts have adopted the position taken by the opinion of Justice Brennan in *Asahi. Continental Research Corp. v. Reeves*, 204 Ga. App. 120, 419 S.E.2d 48, 53 (1992); *Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 411 S.E.2d 640, 644 (1992); *Dillaplain v. Lite Industries, Inc.*, 788 S.W.2d 530, 535 (Mo. App. 1990).

> "Further, we cannot agree that the impact of *World-Wide* has been sufficiently lessened due to the recent Supreme Court decision in *Asahi Metal Industry v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). . . . The Court was evenly split, however, as to the ramifications of *World-Wide* and whether intentionally placing a product in the stream of commerce, without more, provided a sufficient basis for jurisdiction over a foreign defendant.
>
> Subsequently, we hold *World-Wide* still to be the controlling point of authority on this question of when a forum state may assert a personal jurisdiction over a foreign defendant. '*Asahi* does not overrule previous cases that follow the stream of commerce theory, . . . ' In conformity with the trend of North Carolina case law, we uphold the stream of commerce doctrine and find it consistent with the federal Due Process Clause. We hold that the sole act of a manufacturer's intentional injection of his product into the stream of

> commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant." *Cox, supra.*

Finally, as with the federal courts, numerous state courts have simply been unable to join in on the stream of commerce debate as the result of the confusion created by this Court's opinion in *Asahi*. *CMMC v. Salinas*, 929 S.W.2d 435 (Tex. 1996); *A. Uberti and C. v. Leonardo*, 892 P.2d 1354, 1359 (Ariz. 1995); *Wiles v. Morita Iron Works Co., Ltd.*, 530 N.E.2d 1382, 1389 (Ill. 1988).

> "As can be seen from this exposition, it is not possible to determine from *Asahi* whether the broad or the narrow version of the stream of commerce theory is correct. We need not decide this issue, however, for we believe that even under the broader version of the stream of commerce theory, there were no minimum contacts between defendant Morita and the State of Illinois." *Id.*

As the foregoing makes clear, the state of due process analysis with regard to the stream of commerce theory of personal jurisdiction can be described, at best, as greatly unsettled. Not only have both federal and state courts reached opposite conclusions on the issue of the requirements of due process with regard to the stream of commerce theory, but many courts have refused to address the issue at all, due to the lack of any real guidance by this Court. For that reason, this Court should grant the Petition for Writ of Certiorari in this case to resolve the issue of the proper interpretation of the stream of commerce theory of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment.

This case is clearly an appropriate vehicle for that determination. While North Texas Steel contends that the exercise of personal jurisdiction by the Indiana trial court did not comport with the requirements of due process under either Justice O'Connor or Justice Brennan's view of the stream of commerce theory, it is clear that if Justice O'Connor's opinion in *Asahi* is the correct interpretation of the stream of commerce theory, then the Indiana Courts erred in exercising personal jurisdiction over North Texas Steel in this matter. While neither did so expressly, it is apparent that both the trial court and Court of Appeals of Indiana held that jurisdiction was appropriate in this case based on Justice Brennan's view of the stream of commerce theory, i.e., that North Texas Steel placed the storage rack system on which it performed fabrication services into the stream of commerce, knowing that it was destined for the State of Indiana and, accordingly, was subject to personal jurisdiction in the State of Indiana.[1] However, under the approach of Justice O'Connor in *Asahi*, it is readily apparent that the exercise

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[1] North Texas Steel contends that both the trial court and Court of Appeals erred in finding that North Texas Steel had sufficient minimum contacts even under Justice Brennan's view of the stream of commerce theory. Even Justice Brennan would not allow jurisdiction absent a "regular and anticipated flow of products from manufacture to distribution to retail sale." *Asahi*, 480 U.S. at 117, 107 S.Ct. at 1034. In this case, the undisputed evidence in the Record clearly establishes that the sale of the product on which North Texas Steel performed fabrication services for Frazier to Donnelley in Indiana was an isolated occurrence and not part of a regular and anticipated flow of products manufactured by North Texas Steel for distribution and retail sale.

of jurisdiction over North Texas Steel in this case would not comport with due process. North Texas Steel had no contacts with Indiana apart from the fact that it performed fabrication services on a good which it knew was ultimately destined for the State of Indiana. There is no other conduct of North Texas Steel which indicates an intent or purpose to serve the market in the State of Indiana. North Texas Steel did not design the storage rack system which was sold to R.R. Donnelley. That design was done by Frazier. North Texas Steel did not advertise in the State of Indiana and did not establish channels for providing regular advice to customers in Indiana, nor did North Texas Steel market its products through a distributor who agreed to serve as a sales agent in the State of Indiana. Accordingly, if Justice O'Connor's approach to the stream of commerce theory is correct, due process precludes personal jurisdiction by a Court of the State of Indiana over North Texas Steel in this case.

It has been over ten years since this Court issued its decision in *Asahi*. Both before and after that decision, confusion has reigned in the state and federal courts concerning the limits for personal jurisdiction imposed by the Due Process Clause under the stream of commerce theory. The time has come for this Court to end the confusion and determine the appropriate parameters for the exercise of personal jurisdiction over non-resident defendants. The facts of this case make such a determination appropriate.

CONCLUSION

Under this Court's due process jurisprudence, a non-resident defendant is not subject to personal jurisdiction in a forum state unless it has engaged in some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958). The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely on the basis of random, fortuitous or attenuated contacts or the unilateral activity of another party or a third person who claims a relationship with them. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528, 542 (1985). In this case, North Texas Steel has been haled into the Courts of the State of Indiana on the basis of random, fortuitous, and attenuated contacts and as a result of the unilateral activity of Frazier, with whom North Texas Steel contracted to perform fabrication work. For that reason, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
COURT OF APPEALS OF INDIANA

NORTH TEXAS STEEL COMPANY, INC., Appellant-Defendant,	)	No. 43A04-9608-CV-325
vs.	)	
R.R. DONNELLEY & SONS COMPANY, Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Douglas B. Morton, Special Judge
Cause No. 43C01-9512-CP-999

Filed April 29, 1997

OPINION – FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Defendant-Appellant North Texas Steel Company, Inc. (NTS) appeals the trial court's denial of its motion to dismiss for lack of personal jurisdiction and its motion for change of venue in this action initiated by Plaintiff-Appellee R.R. Donnelley & Sons Company (RRD). In response, RRD challenges the jurisdiction of this court over the subject matter of NTS's appeal.

We affirm.

ISSUES

NTS raises two issues for review, which we restate as:

1. Whether the trial court erred in determining that it had personal jurisdiction over NTS.

2. Whether the trial court erred in denying NTS's motion for change of venue.

RRD raises one issue for our review, which we restate as:

1. Whether this court has appellate jurisdiction over the issues raised.

FACTS AND PROCEDURAL HISTORY

RRD's primary business is printing and assembling catalogs for retailers. At its facility in Warsaw, Indiana, catalogs are printed and assembled in portions, called "signatures." After it prints a given amount of signatures, RRD stacks the group together, binds it with bands, stacks the bound materials on pallets, and binds the

group with shrink-wrap plastic. RRD stores the pallets of signatures for a short period of time before further processing.

On or about June 28, 1993, RRD entered into a contract with Associated Material Handling Industries, Inc. (Associated), an Illinois corporation with a principal place of business in the same state, requiring Associated to provide a material handling system, including storage racks, sophisticated forklifts, conveyors, and other related equipment for RRD's facility in Warsaw, Indiana. Associated subcontracted the storage rack design and manufacture to Frazier Industrial Company (Frazier), a New Jersey corporation with a principal place of business in Long Valley, New Jersey. Frazier entered into a contract with NTS, a Texas corporation with a principal place of business in Fort Worth, which required NTS to manufacture or fabricate the rack system according to Frazier's design. After it completed the manufacturing process, NTS shipped the rack system to RRD's Warsaw facility through various carriers. Frazier paid the shipping costs.

The storage racks were installed and ready for use on March 21, 1994. On June 14, 1994, a majority of the storage racks collapsed. The pallets stored on the racks fell to the floor and broke, spilling the signatures. The collapse also caused the fire sprinkler system to burst and soak piles of signatures.

On December 18, 1995, RRD filed a complaint against Associated, Frazier, and NTS for damages caused by the collapse of the storage rack. The complaint included product liability, breach of contract, and negligence claims against the defendants.

After giving notice of depositions to two of RRD's expert witnesses, NTS filed a motion to dismiss the complaint on the basis of lack of personal jurisdiction. NTS also filed a motion for change of venue on the theory that it could not receive a fair trial in Kosciusko County. After hearing evidence and oral argument, the trial court denied both of NTS's motions. In its order on the motion to dismiss, the trial court stated:

> 3. The Court believes that, in weighing the contacts of [NTS] with the State of Indiana, its business practice has fairly submitted it to the jurisdiction of the Courts of Indiana. All of the evidence indicates that [NTS] performed all of its services within the State of Texas but that in so doing, it was specially preparing an item which it knew to be solely for shipment to [RRD] at Warsaw, IN. Because the item was prepared with the knowledge of its specific purpose for shipment and usage within the State of Indiana, the Court believes it proper to consider issues of the product's alleged failure in Indiana courts.
>
> In comparing this special purpose manufacturing with production of a product of a general nature which could be sold on the open market, could be transported to virtually any site, and allegedly cause an injury in a distant jurisdiction, the Court deems the differences sufficient to establish in personam jurisdiction in the first case and to observe the lack thereof in the second.

(R. 468-69).

In its order denying NTS's motion for change of venue, the trial court acknowledged that RRD was an

important institution in Kosciusko County. However, the court determined that this fact did not prevent NTS from receiving a fair trial in the county.

Upon NTS's motion, the trial court certified its ruling for interlocutory appeal. We accept jurisdiction.

DISCUSSION AND DECISION

I. THIS COURT'S EXERCISE OF APPELLATE JURISDICTION

RRD contends that this court lacks jurisdiction to review the trial court's denial of NTS's motions to dismiss for lack of personal jurisdiction and for change of venue. RRD argues that Article 7, § 4 of the Indiana Constitution[1], Ind.Appellate Rule 4(A)(5)[2], and Ind.Original Action Rule 1[3], provide that our supreme court has

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[1] Article 7, § 4 provides that "[t]he Supreme Court shall have no original jurisdiction except in . . . supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction."

[2] App.R. 4(A)(5) provides that our supreme court shall have exclusive jurisdiction of "[s]upervision of the exercise of jurisdiction by the other courts of the State, including the issuance of writs of mandate and prohibition."

[3] Orig.Act.R. 1(A) provides that our supreme court has "exclusive, original jurisdiction to supervise the exercise of jurisdiction of all inferior state courts, including the Court of Appeals by virtue of Indiana Constitution, Article 7, section 4, and Ind.Appellate Rule 4(A)(5)." Orig.Act.R. 1(B) provides that Original Action rules apply to "[a]ctions commenced in the Supreme Court pursuant to the authority in section (A) above for writs of mandamus or prohibition against inferior state

exclusive jurisdiction over appeals concerning trial court jurisdiction and venue. Succinctly stated, RRD contends that issues raised in the trial court concerning lack of personal jurisdiction and change of venue may only be raised in an original action before our supreme court.

The jurisdiction of this court is set forth by our constitution in Article 7, § 6, which provides that we "shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules. . . . " In App.R. 4(b)(6), our supreme court specified that appeals from interlocutory orders are appropriate where the trial court certifies its orders and this court accepts jurisdiction. It is on this authority that this court has exercised jurisdiction over numerous cases involving the issue of a trial court's determination of personal jurisdiction and venue in the past. It is also on this authority that we exercise jurisdiction in this case.

The decision to grant or deny a motion to dismiss based on lack of personal jurisdiction or venue lies within the sound discretion of the trial court. *See Freemond v. Somma*, 611 N.E.2d 684, 687 (Ind. Ct. App. 1993), *reh'g denied, trans. denied* (personal jurisdiction); *Bellmore v. State*, 602 N.E.2d 111, 116 (Ind. 1992), *reh'g denied* (change of venue). Any error arising from an abuse of discretion must be raised in an appeal, not in an original action. *State ex rel. Robinson v. Grant Superior Court No. 1*, 471 N.E.2d 302, 303 (Ind. 1984). Therefore, the question of

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courts and the judge or judges thereof and concerned solely with the question of jurisdiction. . . . "

personal jurisdiction is one for appeal, not for an original action.

RRD argues that in allowing this court to adjudicate appeals from determinations of personal jurisdiction, the supreme court improperly delegated its constitutional responsibility.[4] *See Carpenter v. State*, 360 N.E.2d 839, 842 (Ind. 1977) (holding that Article 7, § 4 merely authorizes the supreme court to supervise the exercise of jurisdiction, not to create it.). RRD's reading of the constitution is too restrictive. The Supreme Court's original jurisdiction to provide "supervision of the exercise of jurisdiction by the other courts of the State" is for the purpose of ensuring that inferior courts act within the nondiscretionary jurisdiction granted by the Constitution and/or applicable statutes. The grant of original jurisdiction is not a mandate that issues pertaining to the trial court's discretion, such as a determination of personal jurisdiction over a defendant, may only be challenged by original action.

II. THE TRIAL COURT'S EXERCISE OF JURISDICTION OVER NTS

The jurisdiction of an Indiana court over a nonresident entity is predicated on Ind. Trial Rule 4.4(A)(1), which grants jurisdiction over an entity doing any business in Indiana. The purpose of the trial rule is to extend

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[4] RRD cites *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N.E. 244 (1888), in support of its argument. This case actually stands for the proposition that the judiciary cannot delegate its responsibilities to another branch of government. 21 N.E.2d at 249.

jurisdiction to the boundaries permitted by the due process clause of the fourteenth amendment to the federal constitution. *Fetner v. Boyd*, 563 N.E.2d 1334, 1336 (Ind. Ct. App. 1990), *reh'g denied, trans. denied*. The due process clause requires that the defendant have "minimum contacts" with the forum state so that the assertion of jurisdiction "does not offend the 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 66 S.Ct. 154, 158 (1945) (citations omitted). Whether minimum contacts exist in a particular factual setting must be determined on a case-by-case basis, and there are no hard and fast rules regarding the existence of minimum contacts. *Kulko v. Superior Court of California*, 98 S.Ct. 1690, 1697 (1978). The due process analysis examines whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2183 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 100 S.Ct. 559, 567 (1980)).

There are two different types of due process analyses in personal jurisdiction cases: general and specific. *Curtis Management Group v. Academy of Motion Picture Arts and Sciences*, 717 F.Supp. 1362, 1366 (S.D. Ind. 1989). General jurisdiction allows a court to entertain a suit against a defendant "because of the defendant's general presence in the forum state regardless of whether that presence is related to the litigation at hand." *Id.* (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S.Ct. 1868 (1984)). Courts are more demanding when jurisdiction is sustained only on a basis of general jurisdiction. In such a

case, the defendant must have "continuous and systematic general business contacts" in the forum state. *Hexacomb Corp. v. Damage Prevention Products Corp.*, 905 F.Supp. 557, 561 (N.D. Ind. 1995) (quoting *Helicopteros*, 104 S.Ct. at 1873)). Specific jurisdiction, on the other hand, "turns on an assessment of the 'relationship among the defendant, the forum, and the litigation.' " *Id.* (quoting *Shaffer v. Heitner*, 97 S.Ct. 2569, 2579 (1977)). Specific jurisdiction is utilized "where the defendant lacks a general presence in the state and where the only possible basis for haling the defendant into court [arises from or is related to] the contacts giving rise to the litigation." *Curtis*, 717 F.Supp. at 1366. The defendant must have purposely availed himself of the "privilege of conducting activities" in the forum state. *Burger King*, 105 S.Ct. at 2183. This insures that jurisdiction over the defendant will not be based on "random, fortuitous, or attenuated contacts" with the forum state. *Id.* When a cause of action arises from or is related to the defendant's contacts with the forum, less is required to support jurisdiction than when the cause of action is unrelated to those contacts. *Mullen v. Cogdell*, 643 N.E.2d 390, 397 (Ind. Ct. App. 1994), *reh'g denied, trans. denied.* Thus, even "a single act" can support a finding of specific jurisdiction, as long as that act creates a "substantial connection" with the forum state. *Burger King*, 105 S.Ct. at 2184, n. 18 (Citing *McGee v. International Life Insurance Co.*, 78 S.Ct. 199, 201 (1957)).

In Indiana, jurisdiction is presumed and need not be alleged. *Fidelity Financial Services, Inc. v. West*, 640 N.E.2d 394, 396 (Ind. Ct. App. 1994). A party challenging jurisdiction must establish lack of jurisdiction by a preponderance of the evidence unless lack of jurisdiction is

apparent on the face of the complaint. *Id.* It is within the trial court's discretion to find the jurisdictional facts; once the facts are decided, the issue of jurisdiction is a question of law. *Id.*

In the present case, we do not find that general jurisdiction exists. There is no evidence to indicate that NTS has a continuous and systematic presence in Indiana through direct advertising or direct solicitation. Furthermore, there is no evidence to indicate that NTS has an office, an agent, employees, or property in the state.

We do find, however, that the trial court was correct in determining that it had specific personal jurisdiction over NTS as RRD's claims arise from or relate to NTS's contact with Indiana.[5] NTS specifically manufactured the rack system for a corporation located in Indiana and then shipped that system to Indiana. The acts of manufacturing and shipping were done with the knowledge that the system was for use by RRD in Indiana. The evidence does not indicate that NTS was a "local" company which "happened" to expand its business into Indiana. Instead, the evidence indicates NTS had a twelve year relationship with Frazier, a New Jersey company. Pursuant to this relationship, Frazier provided NTS with customers for rack systems, including four customers in Indiana. NTS, through its relationship with Frazier, purposely availed itself of the privilege of conducting business in Indiana, and it cannot complain that jurisdiction is being asserted

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[5] We note that RRD also raises the issues of transient jurisdiction and estoppel as relevant to an affirmance of the trial court's exercise of personal jurisdiction over NTS. These issues are rendered moot by our determination here.

by an Indiana court upon the basis of a "random, fortuitous, or attenuated" contact with the state.

We also find that the exercise of personal jurisdiction over NTS comports with the due process concepts of fair play and substantial justice. The factors which form consideration of the fairness of the exercise of personal jurisdiction are (1) the burden on the defendant; (2) the interests of the forum State; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of individual States in furthering fundamental substantive social policies. *Asahi Metal Industry Co. v. Superior Court of California*, 107 S.Ct. 1026, 1033 (1987).

The burden that NTS faces in adjudicating its case in Indiana is understandably heavier than the burden of defending against a suit filed in Texas. However, this factor alone is not sufficient to defeat the existence of jurisdiction. *Hexacomb*, 905 F.Supp. at 563. Furthermore, the burden is offset by the combined interests of (1) RRD in adjudicating in the forum where the damage allegedly occurred and where all the defendants are subject to jurisdiction; (2) Indiana in the application of its product liability law and in obtaining relief for one of its citizens; and (3) the interstate judicial system in the resolution, in a single action, of a controversy involving parties from four states.

NTS places great reliance on *CMMC v. Salinas*, 929 S.W.2d 435 (Tex. 1996), and similar cases, for the proposition that "isolated" contacts with the forum state do not warrant an exercise of personal jurisdiction. In *CMMC*, a

small Texas winery ordered a winepress from an independent distributor. The distributor in turn ordered the winepress from a French manufacturer, which wired the press for use in the United States and then shipped the press to Texas. An injury occurred in Texas while a winery employee was cleaning the press, and the injured employee brought a products liability action against CMMC in Texas. The issue of personal jurisdiction eventually was examined by the Texas Supreme Court, which framed the issue as "whether the Fourteenth Amendment permits a state court to take personal jurisdiction over a foreign manufacturer merely because it knew its allegedly defective product would be shipped to that state." *Id.* at 436. The court ultimately held that "CMMC's mere knowledge that its winepress was to be sold and used in Texas and its wiring the machine for use in the United States were not sufficient to subject CMMC to the jurisdiction of Texas courts." *Id.* at 439.

The distinguishing factor between the facts in *CMMC* and the facts in the present case was noted by the trial court in this case. Pursuant to its contract with Frazier, NTS manufactured a system for RRD and then shipped the system to Indiana for RRD's use. This specific contact exceeded CCMC's [sic] shipping of a generic product to Texas.

III. THE TRIAL COURT'S DENIAL OF NTS'S CHANGE OF VENUE MOTION

NTS contends that the trial court erred in denying its motion for change of venue. The motion was filed pursuant to Ind. Trial Rule 76(A), which mandates a change

of venue "upon a showing that the county where suit is pending is a party or that the party seeking the change will be unlikely to receive a fair trial on account of local prejudice or bias regarding a party or the claim or defense presented by a party."

There are two bases for NTS's motion: (1) it cannot receive a fair trial against RRD in Kosciusko County because RRD is well respected in the county; and (2) it cannot receive a fair trial because county citizens would believe that denying RRD's claim for $12 million would have an adverse impact on the county. In the hearing on the motion, NTS put on evidence indicating that RRD: (1) ranks as the second largest employer in Kosciusko County; (2) provides more than $54 million annually to the economy of Kosciusko County; (3) actively engages in charitable interests in Kosciusko County; and (4) enjoys generally positive coverage by the primary newspaper in the county. In opposition to the evidence submitted by NTS, RRD put on evidence establishing that it has been criticized by the citizens of Kosciusko County for various reasons.

The trial court denied the motion from the bench. It subsequently issued a "Memorandum Upon Denial Of Change Of Venue Motion," which delineated the reasons for the denial. In the memorandum, the trial court noted that RRD enjoys a good reputation in Kosciusko County and that most, but not all, publicity is favorable to RRD in the county. The court also noted that the object of T.R. 76(A) is not "to find a location where no one is familiar with any participants or any of the issues." (R. 471). The court further noted that RRD's reputation neither created

prejudice toward NTS nor influenced citizens of the county to forego their duty of impartiality as jurors.

There is no Indiana case law which examines the issues raised by NTS's motion. NTS cites cases from other states which uphold a trial court's grant of a motion[6], while RRD cites cases which uphold a trial court's denial of a motion[7]. Two conclusions can be drawn from these cases: (1) the trial court has much discretion in making its

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[6] *See Haugo v. Haaland*, 349 N.W.2d 25, 28-29 (N.D. 1984) (holding that a trial court did not abuse its discretion in granting a motion to change venue in a case based on Dram Shop statutes where (1) the defendant bar was organized as a nonprofit organization to support community interests, primarily a community hospital; (2) the county had a small population; and (3) community leaders had commended a local judge for his alleged leniency on traffic offenders); *Altheiser v. Richmondville Creamery Co.*, 13 A.D. 162, 215 N.Y.S.2d 122 (1961) (holding that a trial court did not abuse its discretion in granting a motion to change venue in a case filed by dairy farmers and milk producers where the individuals interested in the outcome of litigation constituted a large portion of eligible jurors in the county).

[7] *See Braswell v. Money*, 344 So.2d 767 (Ala. 1977) (holding that a trial court did not abuse its discretion in denying a motion for change of venue in an action involving the county's largest employer where there was no evidence that the trial had created widespread interest and there was no evidence that opinions had been formed by county residents); *South Carolina Electric and Gas Co. v. Aetna Insurance Co.*, 235 S.C. 147, 110 S.E.2d 165 (1959) (holding that a trial court did not abuse its discretion in denying a motion for change of venue merely because one party had a good reputation in the county); *Bennett v. Jackson*, 172 S.W.2d 395 (Tx. Ct. App. 1943), *reh'g denied* (holding that a trial court did not abuse its discretion in denying a motion for change of venue where the movant failed to show bias).

fact-sensitive ruling on a motion to change venue; and (2) a party should not be penalized for its good reputation.[8]

A party seeking to change venue has the burden to prove the existence of local prejudice or bias which prevents it from receiving a fair trial. T.R. 76(A). We will reverse a trial court's ruling on a motion to change venue only upon a showing of abuse of discretion by the trial court. T.R. 76(A); *Bradley v. State*, 649 N.E.2d 100, 108 (Ind. 1995), *reh'g denied*. An abuse of discretion occurs only when the trial court arrives at a conclusion that is clearly against the logic and effect of the facts and circumstances before the court. *Shanklin v. Shireman*, 659 N.E.2d 640, 642 (Ind. Ct. App. 1995).

In the present case, NTS showed, and the trial court accepted the fact, that RRD has a good reputation and strong presence in Kosciusko County. NTS then tried to show that it must be inferred from RRD's reputation and presence that citizens of Kosciusko County would be prejudiced against NTS and biased in favor of RRD in an action involving a large sum of money. Although the suggested inference may be drawn from the evidence, we do not find that it must be drawn. Therefore, we cannot say that the trial court abused its discretion in not drawing the inference urged upon it by NTS.[9]

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[8] *See Braswell*, 344 S.W.2d at 770; *Aetna*, 110 S.E.2d at 168; *Bennett*, 172 S.W.2d at 398.

[9] We note that the trial court wisely stated that it would entertain a second motion for change of venue upon an indication of prejudice or bias during voir dire.

CONCLUSION

This court has jurisdiction over NTS's appeal. In exercising our jurisdiction, we hold that the trial court has personal jurisdiction over NTS. We further hold that the trial court did not abuse its discretion in denying NTS's motion for change of venue.

Affirmed.

DARDEN, J., and BAKER, J., concur.

STATE OF INDIANA

[SEAL]

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CLERK OF THE SUPREME COURT,
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Cause Number
43A04-9608-CV-00325
Lower Court Number:
43C019512CP999

LARRY BARNARD

1400 ONE SUMMIT SQUARE
FORT WAYNE, IN 46802
NORTH TEXAS STEEL
CO., INC. -V- R.R.
DONNELLEY & SONS CO.

You are hereby notified that the SUPREME COURT has on this day 12/03/97

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH THE

REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR. KM

WITNESS my name and the seal of said Court,
this 3RD day of DECEMBER, 1997

/s/ H. John Theron
Clerk Supreme Court,
Court of Appeals and
Tax Court

STATE OF INDIANA)
) SS:
KOSCIUSKO COUNTY)

IN THE KOSCIUSKO CIRCUIT COURT

1996 TERM

R.R. DONNELLEY & SONS CO.

VS

ASSOCIATED MATERIAL HANDLING, ET AL

CAUSE NO. 43C01-9512-CP-999

(Filed May 10, 1996)

ORDER

This cause is before the Court upon the Motion to Dismiss submitted by defendant North Texas Steel Company, Inc. and heard in open court on the 26th day of April, 1996. Now the Court being advised, hereby directs as follows:

1. The Motion to Dismiss is based upon the failure of in personam jurisdiction over the defendant North Texas Steel.

2. The Motion to Dismiss is now denied.

3. The Court believes that, in weighing the contacts of North Texas Steel with the State of Indiana, its business practice has fairly submitted it to the jurisdiction of the Courts of Indiana. All of the evidence indicates that North Texas Steel performed all of its services within the State of Texas but that in so doing, it was specially preparing an item which it knew to be solely for shipment to R.R. Donnelley at Warsaw, IN. Because the item

was prepared with knowledge of its specific purpose for shipment to and usage within the State of Indiana, the Court believes it proper to consider issues of the product's alleged failure in Indiana courts.

In comparing this special purpose manufacturing with production of a product of a general nature which could be sold on the open market, could be transported to virtually any site, and allegedly cause an injury in a distant jurisdiction, the Court deems the differences sufficient to establish in personam jurisdiction in the first case and to observe the lack thereof in the second.

SO ORDERED this 10th day of May, 1996.

/s/ Douglas B. Morton
Douglas B. Morton,
Special Judge
Kosciusko Circuit Court

Supreme Court, U.S.
FILED
APR 1 1998
OFFICE OF THE CLERK

No. 97-1411

In The

Supreme Court of the United States

October Term, 1997

NORTH TEXAS STEEL COMPANY, INC.,

Petitioner,

vs.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

NELSON NETTLES*
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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution permits an Indiana court to exercise personal jurisdiction, established via minimum contacts analysis, via transient jurisdiction analysis, or via waiver or estoppel, over the Texas corporation who manufactured the product at issue in the case knowing the product would be shipped to, installed and used in Indiana?

PARTIES TO THE PROCEEDING

Respondent, R.R. Donnelley & Sons Company, has no parent companies. R.R. Donnelley & Sons Company has the following non-wholly owned subsidiaries: 77 Capital Partners II, L.P.; 77 Capital Partners, L.P.; AlphaGraphics, Inc.; Arnowitz Studios; Canto, Inc.; Donnelley Enterprise Solutions Incorporated; Donnelley Spatial Data (a General Partnership); GeoSystems Global Corporation; GeoSystems, Inc.; Hands on Technology; Housenet, Inc.; Infonautics Corporation; IntelliQuest Information Group, Inc.; Intervisual Communications, Inc.; MedAccess Inc.; MediaTel Corporation; Metromail Corporation; Modus Media International Holdings, Inc.; Multex Systems, Inc.; Global Directory Services Company; Pacific Magazines & Printing Limited; Siegwerk, Inc.; Stream International Inc.; Tata Donnelley Limited; ViewPoint Information Systems, Inc.

Petitioner is North Texas Steel Company, Inc. Respondent is not aware of any parent companies or non-wholly owned subsidiaries of Petitioner.

Other companies named as defendants in the state trial court have since been dismissed and were not named parties before the Indiana Court of Appeals whose judgment is sought to be reviewed.

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JURISDICTION

The United States Supreme Court lacks jurisdiction to review this appeal. The United States Supreme Court's jurisdiction over appeals from state courts is limited by federal statute:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treatises or statutes of . . . the United States.

28 U.S.C. § 1257(a).

"This provision establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, ___ U.S. ___, 139 L.Ed.2d 433, ___, 118 S.Ct. 481, ___, 1997 U.S. LEXIS 7494 at *12 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' " *Id.* (citing *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770 (1945)). The finality rule should not be easily scorned. *Id.* In this case, no final judgment or decree, by the highest court of a State in which a decision could be had, has been rendered.

A. THE RULING IS NOT A FINAL JUDGMENT OR DECREE

1. The ruling is not final; it is interlocutory

As North Texas Steel correctly notes in its jurisdictional statement, after the trial court denied its motion to dismiss for lack of personal jurisdiction, North Texas Steel chose to seek an interlocutory appeal to the intermediate state appellate court. Under Indiana appellate rules, such an appeal is discretionary in two respects: the interlocutory appeal must be approved by both the trial court and the appellate court. Ind.A.R. 4(B)(6). Interlocutory appeals are limited to issues raised in the order which is certified for interlocutory appeal. *Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 386 (Ind. 1997). There can be no dispute that the ruling on the personal jurisdiction issue was an interlocutory decision of the trial court. Neither the trial court nor the Indiana Court of Appeals had to grant North Texas Steel's request to certify the appeal. The Indiana courts just as properly could have made North Texas Steel wait until the end of the case at the trial level, before seeking any appellate review of the personal jurisdiction decision. By analogy, *see Johnson v. Fankell*, ___ U.S. ___, 138 L.Ed.2d 108, 117 S.Ct. 1800, 1997 U.S. LEXIS 3547 (1997) (holding § 1983 defendant did not have a right to interlocutory appeal in state court action even though federal court provided such right). Merely permitting early review does not convert an interlocutory ruling into a final one.

Traditionally, a judgment that denies dismissal is not final, even if the question involves the jurisdiction of the state courts. *See, e.g., Southern Pacific Co. v. Gileo*, 351 U.S.

493, 496, 100 L.Ed. 1357, 76 S.Ct. 952, 955 (1956) (no final judgment where issues of negligence and damages remained to be tried, but final judgment where negligence and damages stipulated). Under the traditional approach of this Court, the interlocutory judgment finding personal jurisdiction is not final as both liability and damages remain to be tried before a jury.

2. None of the *Cox Broadcasting* exceptions to the final judgment rule apply here

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485, 43 L.Ed.2d 328, 95 S.Ct. 1029, 1037-1041 (1975), this Court listed four situations where a state court ruling would be considered final even if further proceedings are left to occur in the case. Assuming without conceding the continued vitality of *Cox Broadcasting*'s breadth in light of *Jefferson*, none of the following exceptions would apply in this case:

(i) Resolution of the federal issue is determinative of the entire case.

This is not a situation where a decision on personal jurisdiction is outcome determinative and "there is nothing more to be decided". *Id.* 420 U.S. at 479 n.8, 95 S.Ct. at 1038 n.8. Rather, the entire case remains for trial.

(ii) The federal issue will survive and require a decision regardless of the outcome of future proceedings.

Several reasons prevent the application of this exception here. First, this exception cannot receive broad application without largely vitiating the statute's requirement

of a final judgment. As a general matter, federal issues do not arise only, or even usually, at the end of a case when final judgment is entered. Rather, they arise throughout the litigation. The door for interlocutory Supreme Court review under this exception should not be opened, just because a party losing an interlocutory federal issue will likely appeal the loss at the end of the case. Such a rule in effect says a final judgment exists every time a federal issue is resolved which may later be appealed. Therefore, the scope of this exception must remain limited.

Second, a factor underlying this exception (and which may help confine it) is that there is no reason to wait because the remaining state court proceedings "could not remotely give rise to a federal question". *Id.*, 420 U.S. at 480, 95 S.Ct. at 1039. Thus, a better reading of the exception is that it will apply only where there is no chance of other federal issues arising. Here, the entire case awaits and it is certainly too early to posit that no other federal issues could arise.

Third is the simple proposition that North Texas Steel can appeal the adverse ruling at the end of the case, the normal appellate route. North Texas Steels fails to identify any reason why it is better to stretch statutory language and decide the appeal now as opposed to at the end of the case. It has been noted that all of the cases cited in *Cox Broadcasting* "arguably involved elements of hardship in addition to the simple burden of proceedings that might prove unnecessary." 16B Wright, Miller & Cooper, *Federal Practice & Procedure*: Jurisdiction 2d § 4010, p. 174 (1996) (noting the second finality exception would be more convincing if restricted to hardship situations).

Waiting until a final judgment is entered will not seriously prejudice North Texas Steel as it submitted no argument or evidence of difficulty or hardship in litigating the case in Indiana. North Texas Steel has had Indiana counsel since the beginning of this case, and even before suit was filed it participated in mediations in Indiana. (R. 397). Neither is judicial economy favored by exercise of jurisdiction at this time; for even if this Court reviews the minimum contacts analysis of the state court, unless this Court also addresses the alternative arguments regarding transient jurisdiction and waiver or estoppel, granting certiorari and affirming the Indiana court will still disrupt the progress of the case toward trial by distracting the litigants, and reversal of the Indiana court will also lead to further proceedings below on the alternative arguments raised.

Fourth, there is no certainty the federal issue will survive future proceedings; North Texas Steel may win at trial and moot the need for this Court to address a constitutional issue. Similar to *Jefferson*, where resolution of state claims could effectively moot the federal law question, it is too early to address the correctness of the state appellate court's ruling. *See Jefferson*, 1997 U.S. LEXIS 7494 at *14-16.

Fifth, Supreme Court case law does include instances where the Court reviewed interlocutory personal jurisdiction decisions. *Calder v. Jones*, 465 U.S. 783, 788 n.8, 79 L.Ed.2d 804, 104 S.Ct. 1482, 1485 n.8 (1984) (collecting cases). However, those cases are distinguishable from this one with regard to determining finality. In *Calder*, the Court found the California court's decision was final because it was not subject to further review in the state

courts. *Id.* The same was found in *Shaffer v. Heitner*, 433 U.S. 186, 195-196 n.12, 53 L.Ed.2d 683, 97 S.Ct. 2569, 2575-2576 n.12 (1977). As noted herein, further review is possible. In *Rush v. Savchuk*, 444 U.S. 320, 323, 62 L.Ed.2d 516, 100 S.Ct. 571, 575 (1980), the Court accepted jurisdiction without comment or discussion (perhaps the issue was not raised) and the Minnesota Supreme Court did not expound on how the case came before it other than to say it was an appeal, 311 Minn. 480, 483, 245 N.W.2d 624, 627 (1976); however, the issue arose on a garnishment complaint and there appeared little else for the state trial court to resolve once it found jurisdiction to allow garnishment. *See Cox Broadcasting*, 420 U.S. at 479, 95 S.Ct. at 1038 (exception one). Here, exception one is inapplicable. In the other cases cited in *Calder*, the issue was raised by requesting a writ of either prohibition or mandamus. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289, 62 L.Ed.2d 490, 100 S.Ct. 559, 563 (1980) (writ of prohibition); *Kulko v. California Superior Court*, 436 U.S. 84, 88, 56 L.Ed.2d 132, 98 S.Ct. 1690, 1695 (1978) (writ of mandate). Issuance of such a writ is distinct from an interlocutory appeal in its finality.

(iii) Later review of the federal issue cannot be had.

North Texas Steel has the right to an appeal of the final judgment entered in this case. Ind.A.R. 4(A); 28 U.S.C. § 1257(a).

(iv) Resolution of the federal issue would preclude any further litigation rather than just control the nature and character of proceedings.

This is not a case where if North Texas Steel prevailed on the ruling no trial would be held anywhere.

Nor would the remaining issues in litigation wither away. At most, a ruling in favor of North Texas Steel would only alter the forum.

B. THE RULING WAS NOT RENDERED BY THE HIGHEST COURT IN INDIANA IN WHICH A DECISION COULD BE HAD

North Texas Steel could have made the ruling on personal jurisdiction a final judgment. It did not. By challenging the trial court's personal jurisdiction ruling by interlocutory appeal rather than by original action for writ of prohibition to the Indiana Supreme Court, North Texas Steel ordained that this would be an interlocutory appeal rather than an original action finally determined by the Indiana Supreme Court. The Indiana Constitution, *IND CONST art. 7, § 4*, the Indiana Rules of Appellate Procedure, *Ind.App.R. 4(A)(5)*, and the Indiana Rules of Procedure for Original Actions, *Ind.Orig.Act.R. 1(A) and (B)*, are consistent in providing "exclusive" and "original" jurisdiction over personal jurisdiction issues in the Indiana Supreme Court by way of writs of mandamus or prohibition. (The text of these provisions are set forth at A-5 of Petitioner's brief.) R.R. Donnelley raised below the issue of the intermediate appellate court's power to decide the issue on appeal but was unsuccessful. Pet'r.Br. A-5-A-7. By taking the appellate route (even if that route is a permissible one under Indiana law – as the Indiana Court of Appeals found), North Texas Steel chose to raise the issue in interlocutory fashion. Because the decision was interlocutory and rendered by an intermediate appellate court, it is neither final nor a judgment of the highest court from which a decision could be had. One of the

important policies underlying this requirement is that interference with state courts "is reduced to a minimum by affording every opportunity for correction of error by the state courts themselves." 16B Wright, Miller & Cooper, *Federal Practice & Procedure*: Jurisdiction 2d § 4007, p. 131 (1996). The presence of a possibility of the Supreme Court's ruling becoming moot and advisory, if not a jurisdictional bar under 28 U.S.C. § 1257, cautions against review as a discretionary matter.

C. INDEPENDENT AND ADEQUATE STATE GROUNDS

After the adverse decision by the Indiana Court of Appeals, North Texas Steel filed a petition to transfer the appeal to the Indiana Supreme Court, a discretionary review similar to a petition for writ of certiorari. Ind.A.R. 11(B). The Indiana Supreme Court denied the petition to transfer without stating any reasons for doing so. One possibility is that the Indiana Supreme Court believed the sole proper route to raise a personal jurisdiction issue was by original action for writ of prohibition. If the reason for denial of the petition to transfer was because North Texas Steel took the wrong path, such reason is an independent state law basis for not reviewing the lower court's decision. *See Coleman v. Thompson*, 501 U.S. 722, 729, 115 L.Ed.2d 640, 111 S.Ct. 2546, 2553-2554 (1991). Because this possibility exists, the petition for writ of certiorari should be denied for lack of jurisdiction.

STATEMENT OF THE CASE

North Texas Steel takes liberties in stating the evidence as presented to the trial court, found by the trial court, and found by the Indiana Court of Appeals. North Texas Steel waived the right to contest the factual findings of the trial court and certainly does not present the facts most favorable to the ruling. North Texas Steel presents facts irrelevant to the personal jurisdiction issue, and omits facts which are relevant to determining personal jurisdiction, including transient jurisdiction and waiver or estoppel in addition to finding minimum contacts. The procedural history is accurate.

A. WAIVER

First, North Texas Steel waived the right to contest facts most favorable to the finding of personal jurisdiction because it did not raise "sufficiency of the evidence" or "clearly erroneous findings of fact" arguments in the state appellate courts. (Appellant's Br. In Ind.Ct.App. pp. 2, 16-17). Therefore, the facts found by the trial court must be taken as true. That is exactly what the Court of Appeals did in its opinion. The issue raised by North Texas Steel is a question of law, and it may not now argue that this Court should consider or weigh conflicting facts different than done below.

B. MATERIAL UNDISPUTED FACTS

1. Minimum Contacts

North Texas Steel specifically manufactured a rack system for RRD's Warsaw, Indiana, plant. North Texas

Steel manufactured, sold, and shipped a product to Indiana. (R. 180-182 (William Mascharka (president of Fraizer Industrial Company) Aff. ¶¶ 5-9)); *North Texas Steel Company, Inc. v. R.R. Donnelley & Sons Company*, 679 N.E.2d 513, 519 (Ind.Ct.App. 1997). The storage racks were specifically designed and built for the Warsaw, Indiana plant. (R. 118, 135-153). North Texas Steel "knew that the racks which it was fabricating were ultimately going to a distribution center for Donnelley, located in the State of Indiana." (R. 80 (Judd affidavit ¶ 19)).

2. Transient Jurisdiction

Robert P. Judd, president of North Texas Steel, appeared voluntarily in Indiana on April 26, 1996, at the trial court's hearing to testify on defendants' motion for change of venue. (R. 9, 332-333). He was listed and appeared as a witness for North Texas Steel on a motion for change of venue. (R. 564-565). Counsel for North Texas Steel asked Mr. Judd to give testimony on the motion for change of venue. (R. 333). He was not appearing for the jurisdiction issue, and he was not called as a witness for any other party. Mr. Judd was not expected to, and did not testify on North Texas Steel's motion to dismiss for lack of personal jurisdiction. In fact, when R.R. Donnelley's counsel mentioned service of the summons, counsel for North Texas Steel objected on grounds that it was not relevant to the change of venue issue for which Mr. Judd was testifying. (R. 337-338).

Mr. Judd appeared in Indiana voluntarily without subpoena, and for his company's benefit. (R. 338). While

Mr. Judd was in the Kosciusko County, Indiana, courtroom on April 26, 1996, counsel for R.R. Donnelley made a second service of summons and the amended complaint upon North Texas Steel by personally handing the papers to Mr. Judd at the venue hearing pursuant to Indiana Trial Rules 4.4(B)(1), 4.1(A)(2), and 4.6(A)(1). (R. 9, 331).

3. Waiver or Estoppel to Deny Personal Jurisdiction

North Texas Steel's first affirmative defensive move in this case was on January 8, 1996, when it invoked the Indiana court's power by noticing depositions and subpoenaing deponents. (R. 255-260). On January 8, 1996, North Texas Steel noticed two depositions of R.R. Donnelley's expert consultants, Wes Midgley and Ken Wood. (R. 255, 257). Deposition notices are governed by Indiana Trial Rule 30 which permits the attendance of non-party witnesses to "be compelled by the use of a subpoena as provided in Rule 45." Each notice contained a proof of service. (R. 256, 258). Proof of service of a notice to take a deposition constitutes authorization for the Court to issue subpoenas. T.R. 45(D)(1).

Accompanying each notice was a subpoena issued from the Kosciusko County Circuit Court pursuant to Trial Rule 45. *See* (R. 259, 260). Each subpoena consisted of two Court orders: an order for the witness to appear to testify and an order for the witness to produce documents or tangible things as described on the subpoena. *Id.*

The purpose of the depositions was for litigating the merits of the case. The subpoenas themselves call for the

experts' files "concerning your investigation you performed . . . and authorities which you relied upon in reaching your opinion or conclusion in this case". *See* (R. 259, 260). Obviously, the experts were not likely to be testifying on facts significant to jurisdictional issues. The two experts are knowledgeable in *inter alia* the design and construction of storage rack systems. *See* (R. 261-263 and R. 264-265). The collapse of storage racks is the main focus of the factual merits of this case. (R. 12) (Complaint ¶ 27); (R. 116) (Am. Compl. ¶ 27). It was not until January 25, 1996, that North Texas Steel first raised the personal jurisdiction issue by filing a motion to dismiss. (R. 6).

North Texas Steel hired Indiana counsel (Indiana counsel was the one who noticed the depositions and had subpoenas issued) who participated in several attempts to resolve the dispute on an amicable basis including a two day mediation in Indiana pursuant to the Indiana Rules for Alternative Dispute Resolution. (R. 397).

REASONS FOR DENYING THE PETITION

A number of good reasons exist for this Court in its discretion to deny the petition for a writ of certiorari. North Texas Steel's reason why this Court should grant the petition centers on differing views (in state courts, federal appellate courts, and this Court) of the stream of commerce theory for establishing personal jurisdiction. The existence of these differing views is without dispute. Nevertheless, North Texas Steel has not shown how resolution of the splintered views would matter in this case,

particularly in light of this Court's questionable jurisdiction over this case all which may lead to a fractured decision without all justices even reaching the merits.

A. LACK OF IMPORTANCE TO THE INDIANA SUPREME COURT

Like this Court, the Indiana Supreme Court could have reviewed North Texas Steel's arguments. Exercising its discretion, it declined review. If the Indiana Supreme Court did not decline review based on the state procedural ground that North Texas Steel chose the wrong path, then the Indiana Supreme Court must have thought the personal jurisdiction issue was not important enough or contrary to substantial authority sufficient to accept transfer. The decision below gave full consideration to the arguments raised and decided the issue correctly.

B. LACK OF SPECIFIC CONTRARY OPINION IN ANY OTHER COURT

Any decision involving personal jurisdiction is necessarily fact bound. Therefore, to merit review North Texas Steel must show that the facts of this case are "typical" or recur frequently in the course of interstate business. But North Texas Steel presents no basis for believing this is a typical case. Importantly, North Texas Steel's petition fails to identify a single opinion from any state or federal court which is factually indistinguishable from this case. No case is presented as deciding these facts directly contrary to the way the Indiana Court of Appeals did. Either the facts are not typical, or the issue is not as

important as North Texas Steel argues. The decision did not hinge on adopting one theory over another. Rather, the Indiana Court of Appeals simply applied uncontroversial propositions of law to the facts of the case.

C. THE INDIANA COURT'S OPINION IS CONSISTENT WITH PRECEDENT

This is an easy case. The primary basis for the decision is that North Texas Steel "knew that the racks which it was fabricating were ultimately going to a distribution center for Donnelley, located in the State of Indiana." (R. 80); *North Texas Steel*, 679 N.E.2d at 519; (R. 468). That fact distinguishes this case from those where it was the random or fortuitous acts of the user who took the product to another state. Instead, North Texas Steel manufactured the product knowing it was for ultimate use in Indiana, and then shipped the product to Indiana. That a court would rely on the statement of North Texas Steel's own president, (R. 80), is not astonishing.

The Indiana Court of Appeals was faithful to the United States Supreme Court precedent of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980) and *Asahi Metal Industry Co. Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 94 L.Ed.2d 490, 107 S.Ct. 1026 (1987). The Indiana Court of Appeals obviously considered both authorities because both were cited in their proper context in the opinion. *See North Texas Steel*, 679 N.E.2d at 518 and 519.

The opinion is consistent with those and other precedents. The lower courts rejected North Texas Steel's claim that its contact with Indiana was "random, fortuitous, or

attenuated". The facts established more. It was not just foreseeable that the storage racks might end up in Indiana and subject North Texas Steel to liability here. The act of manufacturing and shipping was done with the knowledge that the racks were for use by R.R. Donnelley in Indiana, and nowhere else. This is specific effort and choice by North Texas Steel to serve the Indiana market with its product. North Texas Steel does not point to controlling precedent that was missed by the parties and the Court.

Looking at the point another way, if North Texas Steel did not reasonably expect to be hailed into court in Indiana if its product failed while being used in Indiana, the one state where it knew and expected the product would be used, where else did it expect to be sued for product liability? Purposeful availment of the Indiana economic market, even if there is no physical presence in Indiana, properly results in the injured party's availment to Indiana courts for remedy. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 119 L.Ed.2d 91, 112 S.Ct. 1904, 1910 (1992). The trial court and the court of appeals drew the appropriate line under this Court's precedent. This Court does not need to reexamine such precedent to decide this case.

Even assuming *arguendo* that in order to decide this case this Court would need to determine questions involving the stream of commerce theory, North Texas Steel fails to present a reasonable basis for finding no personal jurisdiction in this case under any arguable application of a stream of commerce theory. Once again, North Texas Steel has failed to offer even one federal or state case similar to this one that applies any form of

stream of commerce theory and finds personal jurisdiction lacking. Thus, the stream of commerce issue may be unsettled, but this is not the case that would be able to settle it.

D. ALTERNATIVE GROUNDS EXIST FOR FINDING PERSONAL JURISDICTION

As alternate reasons to deny the petition for writ of certiorari, R.R. Donnelley submits there are two alternative grounds to affirm the finding of personal jurisdiction in Indiana. Personal jurisdiction was established by way of transient jurisdiction, and personal jurisdiction was established by waiver or estoppel. Although these grounds for the decision were ignored as moot by the Indiana Court of Appeals, 679 N.E.2d at 519 n.5, this Court may deal with the merits of these questions or remand for initial consideration by the Indiana courts. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 25 L.Ed.2d 491, 90 S.Ct. 1153, 1156 n.6 (1970). Because a determination of the minimum contacts question in petitioner's favor would not resolve the personal jurisdiction issue, ultimate resolution of the question bears only marginally on the issue, and therefore is not a good candidate for certiorari.

1. Transient Jurisdiction

Briefly, personal jurisdiction can be obtained over a nonresident when the nonresident is physically present within the forum state. In a unanimous decision, the United States Supreme Court upheld jurisdiction over a

nonresident where the nonresident was served a summons and divorce petition while he was physically present in the forum state. *Burnham v. Superior Court of California*, 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990). "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Burnham*, 495 U.S. at 610, 110 S.Ct. at 2110 (plurality opinion). Furthermore, the Court rejected the "minimum contacts" analysis when confronted with physically present defendants:

> The logic of the *Shaffer* holding . . . does not compel the conclusion that physically present defendants must be treated identically to absent ones. As we have demonstrated at length, our tradition has treated the two classes of defendants quite differently, and it is unreasonable to read *Shaffer* as casually obliterating that distinction. *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant "be not present within the territory of the forum," and nothing in *Shaffer* expands that requirement beyond that.

Burnham, 495 U.S. at 621, 110 S.Ct. at 2116 (citations omitted).

A physically present defendant provides personal jurisdiction even if there are *no contacts* with the former state. Here, Mr. Judd, president of North Texas Steel, was voluntarily present in the forum and was personally served with process while present in the forum on behalf of North Texas Steel for the venue hearing only. If not established before, personal jurisdiction attached at the time of personal service of process.

2. Waiver or Estoppel to Deny Personal Jurisdiction

"[T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 704, 72 L.Ed.2d 492, 102 S.Ct. 2099, 2105 (1982). Like all personal privileges, personal jurisdiction "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168, 84 L.Ed. 167, 60 S.Ct. 153, 155 (1939); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180, 61 L.Ed.2d 464, 99 S.Ct. 2710, 2715 (1979). "The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not." *Insurance Corp. of Ireland*, 456 U.S. at 704, 102 S.Ct. at 2105. Waiver of a personal privilege respecting the place of suit will have occurred when the merits of the case are reached. *See Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 180, 73 L.Ed. 252, 49 S.Ct. 98, 99 (1929). More basically, personal jurisdiction will exist where there is:

> some act by which the defendant **purposefully avails itself** of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 78 S.Ct. 1228, 1240 (1958) (emphasis added).

"A party need not actually file an answer or motion before waiver is found." *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732-733 (7th Cir. 1990).

The United States Supreme Court "has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures." *Insurance Corp. of Ireland*, 456 U.S. at 704, 102 S.Ct. at 2105 (citing *Adams v. Saenger*, 303 U.S. 59, 67-68, 82 L.Ed. 649, 58 S.Ct. 454, 458 (1938) and *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29-30, 61 L.Ed. 966, 37 S.Ct. 492, 493 (1917)); *Western Life Indemnity Company of Illinois v. Rupp*, 235 U.S. 261, 272, 59 L.Ed. 220, 35 S.Ct. 37 (1914). However, regardless of whether federal or state law determines when a party has waived or is estopped from asserting lack of personal jurisdiction, North Texas Steel has waived or is estopped from claiming jurisdiction is lacking.

Before North Texas Steel raised the affirmative defense of lack of personal jurisdiction, North Texas Steel purposefully availed itself of the affirmative power and procedure of the Indiana courts by subpoenaing expert witnesses for deposition and document production. By doing so, North Texas Steel cannot now claim Indiana lacks jurisdictional power over it because it has taken advantage of such power for its own benefit.

Issuance of a subpoena is an exercise of the court's power and authority to require compliance under threat of contempt. By calling on the subpoena power of the trial court backed by the authority to hold disobedience in contempt, North Texas Steel "purposefully availed itself" of the judicial powers available in this jurisdiction. Seeking to depose R.R. Donnelley's two experts is a significant step, perhaps the most significant step, in the litigation of and defense on the merits of this case. Once

invoking the power of Indiana's courts, North Texas Steel cannot now argue that Indiana has no jurisdiction.

CONCLUSION

For the foregoing reasons, North Texas Steel's petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1411

In The

Supreme Court of the United States

October Term, 1997

NORTH TEXAS STEEL COMPANY, INC.,

Petitioner,

vs.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. THIS COURT HAS JURISDICTION TO REVIEW THIS ACTION

In Respondent's Brief in Opposition, respondent, R.R. Donnelley & Sons Company (hereinafter "Donnelley") contends that this Court lacks jurisdiction to review this appeal under 28 U.S.C. §1257(a) for the reason that it is not an appeal from a final judgment on the merits. Donnelley argues that none of the exceptions found in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975), apply to this appeal from the Indiana Court's denial of a Motion to Dismiss for lack of personal jurisdiction. In doing so, Donnelley either ignores or makes a quixotical attempt to distinguish a long line of cases wherein this Court has exercised jurisdiction over cases prior to a final resolution on the merits involving the issue of whether the exercise of personal jurisdiction over a non-resident defendant complied with the requirements of due process. *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984); *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

Indeed, in *Calder*, this Court specifically considered and rejected the argument asserted by Donnelley.

> "Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court 'is plainly final on the federal issue and is not subject to further review in the state courts.' *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975). Accordingly, as in several past cases presenting jurisdictional issues in this posture, we conclude that the judgment below is final within the meaning of [28 U.S.C. §1257]'." *Id.*, 465 U.S. at 789, n. 8.

Donnelley attempts to distinguish *Calder* and *Shaffer* on the grounds that in those cases the Court's decision was final and not subject to further review in the state court. However, Donnelley has wholly failed to state how the decision of the Indiana Court of Appeals, with the denial of transfer by the Indiana Supreme Court, is subject to further review in the Indiana courts.

Donnelley attempts to distinguish *Kulko* in *World-Wide Volkswagon* on the grounds that the jurisdictional issue in those cases were raised by the request for a writ of prohibition or writ of mandamus. That is clearly a distinction without a difference. No matter how the issue of personal jurisdiction was raised in the appellate courts of the jurisdiction at issue, the judgment is no more or less final. In those cases, as in this case, there had been no trial on the merits and the issue of personal jurisdiction would not be determinative of the merits of the action. Nevertheless, in each of those cases, this Court exercised its jurisdiction to review the state court's determination that it had personal jurisdiction over a nonresident defendant.

In short, it is well established by the precedent of this Court that this Court has jurisdiction under 28 U.S.C. §1257 to review final state court determinations of whether the court has personal jurisdiction over a non-resident defendant. Accordingly, this Court should not deny the Petition for Writ of Certiorari on that basis.

Donnelley next argues that jurisdiction in this case is not appropriate because the decision of the Indiana Court of Appeals was not a decision rendered by the highest court in Indiana in which a decision could be had. Donnelley argues, as it did in the Indiana courts, that North Texas Steel should have raised the issue of personal jurisdiction by the means of an original action for writ of mandamus, and not by way of a permissive interlocutory appeal. However, this argument was considered and rejected by the Indiana Court of Appeals, which held that this action was properly one to be considered by means of appeal, and not an original action. (Petition for Writ of Certiorari, Appendix, pp. A5-A7). Apparently, Donnelley would have this Court review the Indiana Court of Appeals' determination of an issue of Indiana appellate procedure. Clearly, such a review would not be appropriate under the guise that this Court lacks jurisdiction under 28 U.S.C. §1257.

For all of the foregoing reasons, jurisdiction over this appeal by this Court is appropriate.

II. THERE WERE NO INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUPPORT THE DETERMINATION OF THE INDIANA COURT OF APPEALS

Donnelley contends that the Petition for Writ of Certiorari should be denied because "the possibility exists" that the reason for the denial of discretionary review by the Indiana Supreme Court is that petitioner, North Texas Steel Company, Inc., (hereinafter "North Texas Steel"), mistakenly pursued its appeal via means of interlocutory appeal rather than by an original action. In support of this proposition, Donnelley cites *Coleman v. Thompson*, 501 U.S. 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). However, the Opinion of this Court in *Coleman* in no way supports Donnelley's argument. Indeed, a cursory review of *Coleman* makes clear that the "possibility" that the Indiana Supreme Court denied transfer on the basis of a procedural irregularity is not a sufficient reason for this Court to reject a petition for writ of certiorari.

In *Coleman*, this Court discussed the opinion in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), wherein this Court considered the issue of whether an ambiguous state court decision set forth an independent and adequate state law ground for the outcome. In *Michigan v. Long*, this Court established a conclusive presumption of jurisdiction in cases involving such ambiguous state court decisions.

> "When, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the

> face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1040-1041, 103 S.Ct. at 3476.

Certainly, in this case, there is nothing in the Order denying the Petition for Transfer by the Indiana Supreme Court which would in any way indicate that transfer was denied on the basis that North Texas Steel should have filed an original action, rather than pursuing an interlocutory appeal. Accordingly, under *Michigan v. Long*, it must be conclusively presumed that the decision was based on federal grounds and that there is no independent and adequate state ground to support the decision.

III. THE INDIANA SUPREME COURT'S DENIAL ON TRANSFER IS NOT CAUSE FOR THIS COURT TO REFUSE TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Donnelley argues that if the Indiana Supreme Court did not decline review on the procedural ground that North Texas Steel should have filed an original action, then the Indiana Supreme Court must have concluded that the jurisdictional issue was not important enough to warrant transfer and, therefore, that this case lacks importance sufficient to warrant this Court's granting the Petition for Writ of Certiorari. However, the fact that the Indiana Supreme Court denied transfer in this case should have absolutely no bearing on whether the Petition for Writ of Certiorari is granted. Indeed, the rules of this Court clearly contemplate the filing and acceptance of a petition for writ of certiorari seeking review of a

judgment of a lower state court that is subject to discretionary review by the state court of last resort, where such discretionary review is denied. See, Rule 13.1 of the Rules of the Supreme Court of the United States. Accordingly, the fact that the Indiana Supreme Court refused its opportunity to exercise discretionary review over the judgment of the Indiana Court of Appeals, does not mean that this Court should deny the Petition for Writ of Certiorari in order to resolve the continuing conflict which has arisen in both the federal courts and the state courts concerning the stream of commerce theory of personal jurisdiction.

IV. THIS CASE IS AN APPROPRIATE VEHICLE TO DETERMINE THE OUTER LIMITS OF DUE PROCESS FOR THE PURPOSE OF PERSONAL JURISDICTION

Donnelley contends that there are no cases in other jurisdictions reaching a contrary result and that this case is consistent with existing precedent. However, that is clearly not the case. For example, the opinion of the Indiana Court of Appeals in this case is in conflict with an opinion of the Texas Supreme Court in *CMMC v. Salinas*, 929 S.W.2d 435 (Tex. 1996). In *CMMC*, a small winery located in Texas ordered a wine press from an independent distributor of equipment used in the wine and juice industries. That distributor, in turn, ordered the wine press for the winery from a French manufacturer, instructing that manufacturer to wire the press for electrical use in the United States. The distributor instructed the French manufacturer to arrange for transport of that wine

press to Texas. The manufacturer complied and thus knew the destination of the press was Texas.

The French manufacturer sold wine production equipment primarily in Europe. It did not directly market or advertise its equipment in the United States, other than providing promotional material to its distributors. The distributors advertised the manufacturer's products, but the manufacturer did not specifically authorize or approve the ads. It manufactured and sold equipment in the United States, including a direct sale to another winery in Texas. However, the manufacturer had never had a place of business, distributor or representative in Texas or any other contact with Texas. The purchaser of the wine press did not have any direct contact with the manufacturer.

An employee of the Texas winery who injured his arm while cleaning the press filed a products liability action against the French manufacturer asserting strict liability and negligence claims. After the trial court dismissed the action for lack of personal jurisdiction, the Texas Court of Appeals reversed, holding that personal jurisdiction could be asserted against the French manufacturer solely on the basis of its knowledge that the wine press which it manufactured would be shipped to Texas. The Texas Supreme Court reversed, holding that asserting jurisdiction over the French manufacturer would be a violation of the due process clause.

In *CMMC*, the Texas Supreme Court considered the opinions of this Court in *Asahi* and *World-Wide Volkswagon* in reaching the conclusion that the exercise of

jurisdiction over the nonresident corporate defendant in that case would violate due process.

> "For now, we need not take sides in the *Asahi* debate over the stream of commerce doctrine because of the difference in the factual circumstances of that case and the one now before us. Asahi's products were regularly sold in California, only not by Asahi. CMMC's wine producing equipment did not regularly find its way to Texas. Neither CMMC nor KLR made any effort to market CMMC's equipment in Texas, other than by advertisements in magazines with national circulation. Hill Country Cellar's purchase was an isolated event. KLR did not contact Hill Country Cellars; Hill Country Cellars contacted KLR. Hill Country Cellars never had any contacts at all with CMMC. CMMC's mere knowledge that its winepress would be sold and used in Texas and its wiring the machine for use in the United States were not sufficient to subject CMMC to the jurisdiction of Texas courts. This evidence simply does not show that CMMC designed products for use in Texas, or that it made any effort to market them here, or that it took any other action to purposely avail itself of this market. Even Justice Brennan's view of the stream of commerce doctrine will not allow jurisdiction absent a 'regular and anticipated flow of products from the manufacturer to distribution to retail sale.' . . . There is no flow of products from CMMC to Texas; there is scarcely a dribble." *Id.*, at 439.

The Opinion of the Supreme Court of Texas in *CMMC* cannot be reconciled with the Opinion of the Indiana Court of Appeals in this action. As Donnelley notes in Respondent's Brief in Opposition, "the primary basis for

the decision is that North Texas Steel 'knew that the racks which it was fabricating were ultimately going to a distribution center for Donnelley, located in the State of Indiana.' " (Respondent's Brief in Opposition, p. 14). The issue in this case, as in *CMMC*, is whether knowledge that one's product is ultimately going to be utilized in the forum state, standing alone, is sufficient for the exercise of personal jurisdiction over a non-resident defendant consistent with the Due Process Clause. That was precisely the question left unanswered in *Asahi* and the question on which the courts of Indiana and Texas, as well as numerous other state and federal courts have differed.

V. CONCLUSION

For all of the foregoing reasons, and for those reasons set forth in the Petition for Writ of Certiorari, North Texas Steel's Petition for Writ of Certiorari should be granted.

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